No. 83728-7

**IN THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**



KATHLEEN HARDEE,

Petitioner.

v.

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,

Respondent.

# BRIEF *AMICUS CURIA* OF THE WASHINGTON STATE VETERINARY MEDICAL ASSOCIATION

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## I. ISSUES RAISED BY WSVMA

Given that the right to an occupation is a fundamental right guaranteed by the 14th Amendment to the U.S. Constitution, may the government nonetheless treat modest occupations with less regard than learned professions?

## II. IDENTITY AND INTEREST OF WSVMA

The Washington State Veterinary Medical Association is a statewide, not-for-profit organization. It exists for the benefit and improvement of the veterinary medicine practiced in the State of Washington. The mission statement of the WSVMA is:

> The Washington State Veterinary Medical Association creates a strong practice community that provides education, representation and the sharing of ideas dedicated to improving member success as well as animal and human health.

Something in excess of 1,600 veterinarians and veterinary students belong to the WSVMA.

Like state-licensed childcare providers, the members of the WSVMA are able to practice their profession and earn their living only by grant of a license from the State of Washington. In addition, the WSVMA employs numerous paraprofessionals including licensed veterinary technicians and registered veterinary medication clerks. The WSVMA also has a strong interest in their valued paraprofessionals retaining their

constitutionally-based rights to liberty and due process of law. A decision of this court in favor of the State of Washington will directly undermine the fundamental rights of veterinarians, technicians, and medication clerks to equal treatment and due process of law. In addition, as will be shown below, the position of the State of Washington directly violates federal constitutional law.

## III. STATEMENT OF THE CASE

The American Civil Liberties Union has succinctly stated the case and the WSVMA can do no better. It is reproduced here for ease of reference.

Petitioner Kathleen Hardee made her living as an in-home childcare provider for 23 years until her license was revoked by the State. Supp. Br. of Petitioner at 1. The State revoked Petitioner's license based on the preponderance of the evidence standard, which the Court of Appeals upheld. *Hardee v. Dep't of Soc. and Health Servs., et al.*, 152 Wn. App. 48, 56-57, 215 P.3d 214 (2009), *review granted*, 168 Wn.2d 1006 (2010). The court rejected Petitioner's argument that, because significant liberty and property interests were at stake, she had a due process right to the more demanding "clear and convincing" evidence standard to which other licensed professionals, such as doctors and registered nursing assistants, are entitled. *Id.*; *see also* Supp. Br. of

Petitioner at 5-13; Op. Br. of Appellant at 29-32 (discussing Petitioner's due process rights under U.S. Const. Amend. V and XIV and Wash. Const. Art. 1, § 3, and cases interpreting those provisions).

The Court of Appeals distinguished childcare from work performed by doctors and registered nursing assistants on two bases. First, the court found that licenses for doctors and nursing assistants relate to particular individuals, whereas Petitioner's license was "in the nature of a site license." *Hardee*, 152 Wn. App. at 56-57. Second, the court found that a childcare license is "more in the nature of an occupational license than a professional license" and that only licenses requiring graduation and qualifying examinations are professional licenses. *Id.* The court therefore likened the revocation of a childcare license to the suspension of an erotic dancer's license. *Id.*

## IV. ARGUMENT

### A. Summary of argument.

The right to work – to have an occupation – is a fundamental liberty guaranteed by the 14th Amendment. The 14th Amendment draws no distinction: modest occupations such as exotic dancer or daycare provider have the liberty interest and property right in their license to work as any of the learned professions. The State has no power to treat daycare providers with less respect than any other occupation.

### B. The Court of Appeals misapprehended the burden of proof mandated by *Mathews v. Eldridge.*

In its decision, the Court of Appeals failed to apply *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The Court of Appeals focused on the nature of the license rather than the interests at stake. *Hardee v DSHS,* at ¶ *15*. This was error.

> We must not confuse the constitutional *right* to be applied with the *interest* to be protected. The Due Process Clause of the Fourteenth Amendment to the United States Constitution precludes states from depriving any person of "life, liberty, or property, without due process of law." The "right" is due process, Dr. Nguyen's *interest* is his property, his liberty, or both. (footnotes omitted)

*Bang Nguyen v. Department of Health,* 144 Wn.2d 516,544 29 P.3d 689 (2001). Whether Ms. Hardee had a "site" license or a professional license is a distinction without a constitutional difference.

The misapprehension by the Court of Appeals leads the government even deeper into error. The government asserts in its brief that small children will be harmed unless the preponderance of the evidence standard is used. Brief of Respondent at 20. This is a mere assumption by the government and no evidence supporting it is offered. In effect, the government argues that it is necessary to attenuate a fundamental liberty in order to give the government a mere illusion of safety. To paraphrase this court in *Nguyen*, it makes little sense to contend either the safety of small children or the confidence of the public in the

daycare occupation is bolstered by the erroneous de-licensure of qualified daycare providers. The public ultimately depends upon the *provision* of a daycare services, not their elimination. *See, Nguyen*, at 533.

Moreover, the government position reverses the common law norm: "the law holds that it is better that ten guilty persons escape than that one innocent suffer." 2 Blackstone's Commentaries. c. 27, margin page 358, *ad finem.*

To grasp Blackstone's relevancy, some background is in order. Occupational de-licensure proceedings are punitive in nature. "Its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose." *In re Revocation of License of Kindschi,* 52 Wn.2d 8, 319 P.2d 824 (1958*); Nguyen v State,* 144 Wn.2d 516, 528, 29 P.3d 689 (2001). De-licensure affects the worker's property rights and, more importantly, his or her liberty. *Nguyen*, at 522. For this reason, proceedings to remove or attenuate the right to practice an occupation is "quasi-criminal." *Nguyen*, at 523; *Wash. Med. Disciplinary Bd. v. Johnston,* 99 Wn.2d 466, 474, 663 P.2d 457 (1983).

The common law of England, including the English statutes in force at the date of the Declaration of Independence, continues to be the law of this state except as it is inconsistent with the state and Federal constitution, or incompatible with the institutions and society of this state,

or modified by statute. *Cooper v. Runnels*, 48 Wn.2d 108, 291 P.2d 657 (1955). Common law prevails except where abrogated by state or federal constitutions or statutes. *Corcoran v. Postal Telegraph Cable Co.*, 80 Wash. 570, 142 P. 29 (1914); *Jones v Matson*, 4 Wn.2d 673, 104 P.2d 591 (1940); *In re Hudson,* 13, Wn.2d 673, 126 P.3d 765 (1942).

The argument that some guilty will go free if appropriate due process is allowed must fail in light of the common law tradition this state follows.

### C. It is the right to practice an *occupation* — not just a learned profession — that is a fundamental component of liberty.

> The society that scorns excellence in plumbing as a humble activity and tolerates shoddiness in philosophy because it is an exalted activity, will have neither good plumbing nor good philosophy. Neither their pipes nor their theories will hold water.

*Excellence*: *Can We be Equal and Excellent Too?* By John W. Gardner W. W. Norton & Company; Revised edition (April 1995).

Physicians, veterinarians, ditch diggers, exotic dancers, nursing assistants, daycare providers, and veterinary medical clerks all have the same liberty interest in their occupation and are entitled to the same and equal level of due process. It is now beyond question, at least as a matter of federal constitutional law, that the right to practice an occupation is a fundamental liberty guaranteed to all people by the 14th Amendment to the

United States Constitution. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978). The United States Supreme Court has summarized the guarantees of the 14th Amendment, drawing no distinctions between modest occupations and learned professions:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (Emphasis added)

*Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (1923). As this court has pointed out, an occupational license is not only a property right, but a fundamental liberty. While indeed the state has the police power to regulate and license certain occupations, it has no power to treat one occupation with less due process than another. The fact of the matter is, no one occupation is better or more important than another.

Both the Court of Appeals and the government have fallen into the same conceit. Perhaps unconsciously, they view child care as an occupation less worthy of their respect than, say, medicine or law. That is the antithesis of the equality before the law intended by the framers and

against the grain of the American experience. De-licensure proceedings involving doctors and lawyers are "quasi-criminal," and there is no legal distinction in this regard between lawyers and doctors. *Nguyen*, at 529. As catastrophic as the loss of a law or medical license might be, the de-licensure of a daycare provider likely condemns the provider to a life of penury:

> Ms. Ongom's employment is probably much less financially rewarding than that of a medical doctor, but it is nevertheless all she has, and she is at least equally dependent upon her professional reputation for employment.

*Ongom* at 140. As pointed out by this court in *Ongom*, a daycare provider's inability to practice her occupation, which she has done for 23 years, is a good deal more damaging than the loss to a physician or lawyer. Doctors and lawyers have many career opportunities that do not require the possession of the law or medical license. The daycare provider arguably has far few opportunities. In that respect, the consequences to an erroneous deprivation of a license to a daycare operator are *greater* than the consequences to a physician or lawyer.

Given the stakes, the burden of proof is an essential component to a fair proceeding. On this issue, this court has spoken eloquently:

> . . . [N]one of these procedural safeguards can substitute for, nor is even relevant to, failure to impose the requisite minimal burden of proof which is specifically designed 'to

> impress the fact finder with the importance of the decision' and thereby reduce the chance of error.

*Nguyen* at 530, *citing Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, [*538] 60 L. Ed. 2d 323 (1979)

## V. CONCLUSION

The erroneous deprivation of an occupational license has important consequences to the public, as well as to the liberty and property rights of the licensee. Providing a daycare is an essential service to many people, however modest that occupation may appear. The parents depend on Ms. Hardee in order to maintain their occupations and financial security. If a daycare operator is erroneously deprived of her license, the parents suffer severely. Moreover, as has been stated many times in many contexts, the government has as strong a stake in the preservation of the individual's liberty as the licensee herself. However strongly the legislature's intent is stated, the legislature has no power to elevate a hypothetical risk to the protected population over the very real constitutional liberties and property rights of the citizenry. An incompetent physician can do great harm to his or her patients. Imagine, for instance, an incompetent pediatric surgeon and the harm that may be done. To echo this court's holding in *Nguyen*, there is no distinction in principle between a pediatric surgeon and a daycare provider, as far as the law is concerned.

*Nguyen* and *Ongom* were correctly decided and should be sustained. Ms Hardee, like all persons working in regulated occupations, is entitled to the same due process of law as anyone else. The Court of Appeals should therefore be reversed.

Respectfully submitted this 28th day of September, 2010.

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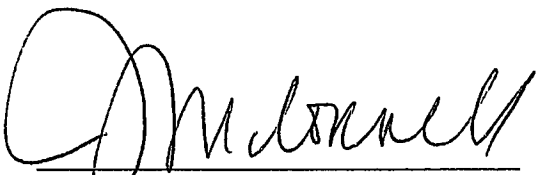
## DECLARATION OF SERVICE

I, Jennifer L. McConnell, declare as follows:

1. I am the legal assistant to John W. Schedler, counsel for *AMICUS* Washington State Veterinary Medical Association. By agreement of all counsel, I have served a copy of the *Amicus* Brief and Motion by the Washington State Veterinary Medical Association with all counsel in pdf via email attachment.

I declare under penalty and perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of September, 2010.



Jennifer L. McConnell, Legal Assistant